

INDIANA STATE RECOUNT COMMISSION

MINUTES OF THE DECEMBER 7, 2008 MEETING

MEMBERS PRESENT: Todd Rokita, Chairman of the Indiana State Recount Commission ("the Commission"); Gordon Durnil, Member; John Fernandez, Member

MEMBERS ABSENT: None

STAFF ATTENDING: Bradley W. Skolnik, Recount Director; J. Bradley King, Majority Counsel; Leslie Barnes, Minority Counsel; Bruce Hartman, Sara Bellamy, Kerry Fleming, Paul Lottes, Michael J. Rogina, and Michael Williams, State Board of Accounts; Major Turner, Indiana State Police

1. CALL TO ORDER:

The chair called the reconvened meeting of the Commission to order at 12:00 noon in the Tippecanoe Room, Tippecanoe County Building, 20 North Third Street, Lafayette, Indiana.

2. COMMISSION BUSINESS:

The Commission transacted the business and took the official actions set forth in the Transcript, which is incorporated by reference into these minutes.

The Commission approves the Transcript, with the following corrections:

On page 2, Mr. Bradley W. Skolnik, Mr. J. Bradley King and Ms. Leslie Barnes are incorrectly identified as members of the Commission. The Transcript is amended to identify Mr. Skolnik as the Recount Director, Mr. King as Majority Counsel to the Commission, and Ms. Barnes as Minority Counsel to the Commission.

On pages 20 through 53, each reference to "COMMISSIONER SKOLNIK" is amended to read "DIRECTOR SKOLNIK"; on pages 21 through 53, each reference to "COMMISSIONER KING" is amended to read "MR. KING"; on pages 38 through 53, each reference to "COMMISSIONER BARNES" is amended to read "MS. BARNES".

On page 53, line 14, delete "[sic]".

3. ADJOURNMENT:

There being no further business before the Commission, the Commission adjourned at 1:50 p.m.

APPROVED:



Bradley W. Skolnik,
Recount Director

INDIANA STATE RECOUNT COMMISSION

MINUTES OF THE DECEMBER 7, 2008 MEETING

MEMBERS PRESENT: Todd Rokita, Chairman of the Indiana State Recount Commission ("the Commission"); Gordon Durnil, Member; John Fernandez, Member

MEMBERS ABSENT: None

STAFF ATTENDING: Bradley W. Skolnik, Recount Director; J. Bradley King, Majority Counsel; Leslie Barnes, Minority Counsel; Bruce Hartman, Sara Bellamy, Kerry Fleming, Paul Lottes, Michael J. Rogina, and Michael Williams, State Board of Accounts; Major Turner, Indiana State Police

1. CALL TO ORDER:

The chair called the reconvened meeting of the Commission to order at 12:00 noon in the Tippecanoe Room, Tippecanoe County Building, 20 North Third Street, Lafayette, Indiana.

2. COMMISSION BUSINESS:

The Commission transacted the business and took the official actions set forth in the Transcript, which is incorporated by reference into these minutes.

The Commission approves the Transcript, with the following corrections:

On page 2, Mr. Bradley W. Skolnik, Mr. J. Bradley King and Ms. Leslie Barnes are incorrectly identified as members of the Commission. The Transcript is amended to identify Mr. Skolnik as the Recount Director, Mr. King as Majority Counsel to the Commission, and Ms. Barnes as Minority Counsel to the Commission.

On pages 20 through 53, each reference to "COMMISSIONER-SKOLNIK" is amended to read "DIRECTOR SKOLNIK"; on pages 21 through 53, each reference to "COMMISSIONER KING" is amended to read "MR. KING"; on pages 38 through 53, each reference to "COMMISSIONER BARNES" is amended to read "MS. BARNES".

On page 53, line 14, delete "[sic]".

3. ADJOURNMENT:

There being no further business before the Commission, the Commission adjourned at 1:50 p.m.

APPROVED:

Bradley W. Skolnik,
Recount Director

Original

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

BEFORE THE
INDIANA RECOUNT COMMISSION

IN THE MATTER OF THE RECOUNT)
AND CONTEST FOR THE ELECTION OF)
INDIANA STATE REPRESENTATIVE,)
DISTRICT 26,)
JOHN POLLES,)
Petitioner,)
Cross-Respondent)
-vs-)
RANDY TRUITT)
Respondent,)
Cross-Petitioner)

Sunday, December 7, 2008

Tippecanoe Room
Tippecanoe County Building
20 North Third Street
Lafayette, Indiana

A STENOGRAPH RECORD BY:
Jenny L. Reeve, RPR-CSR No. 00-R-3006
Notary Public
Certified Stenographic Reporter

Connor + Associates, Inc.
1650 One American Square
Indianapolis, IN 46282
(317) 236-6022

A P P E A R A N C E S

THE COMMISSION:

Mr. Todd Rokita
Secretary of State and Commission Chairman

Mr. Bradley W. Skolnik
Mr. J. Bradley King
Mr. Gordon Durnil
Mr. John R. Fernandez
Ms. Leslie A. Barnes

THE STATE BOARD OF ACCOUNTS:

Mr. Michael J. Rogina
Mr. Kerry Fleming
Ms. Sara Bellamy
Mr. Bruce Hartman
Mr. Paul Lottes
Mr. Michael Williams

COUNSEL FOR THE PARTIES:

Mr. Lawrence M. Reuben
~~Counsel for Petitioner, Cross-Respondent~~
136 East Market Street, Suite 200
Indianapolis, IN 46204

Mr. William Bock, III
Mr. Steve E. Runyan
Counsel for Respondent, Cross-Petitioner
Kroger Gardis & Regas
111 Monument Circle, Suite 900
Indianapolis, IN 46204-5125

I N D E X O F P R O C E E D I N G S

	Page
THE PLEDGE OF ALLEGIANCE	4
PETITIONER'S CASE IN CHIEF	26

I N D E X O F E X A M I N A T I O N

	Page
EXAMINATION OF WITNESS JACQUELINE BRIER	
Direct	29
Cross	33
Redirect	34
Examination by the Commissioners	42

[REPORTER NOTE: All exhibits retained by counsel]

1 **CHAIRMAN ROKITA:** Good afternoon, and welcome
2 to this reconvened session of the Indiana State
3 Recount Commission. I'm pleased you could all
4 attend.

5 My name is Todd Rokita. I'm the Indiana
6 Secretary of State and Chair of this Recount
7 Commission. I'm joined by two very good attorneys
8 and friends of mine. First, to my left is the
9 Democratic appointee to the Recount Commission,
10 Mr. John Fernandez, and to my right is the
11 Republican appointee to the Recount Commission,
12 Gordon Durnil.

13 We will be hearing matters today in the order
14 of the agenda that's been prepared for us.

15 Before we go further, though, I would like to
16 have everyone rise and pledge our allegiance to the
17 flag.

18 *(WHEREUPON, the Pledge of Allegiance is*
19 *recited.)*

20 **CHAIRMAN ROKITA:** Again, the Commissioners and
21 I thank you for being here today.

22 Before we get into the substantive matters, I
23 want to introduce the two elected officials in the
24 room that I know of. If there are others, please
25 identify yourselves.

1 First, from Warren County we have clerk of the
2 circuit courts, Ms. Jackie Brier. Jackie, thank you
3 for being here. And from Tippecanoe County, we have
4 the clerk of the circuit courts, Ms. Linda Phillips.
5 Thank you for being here.

6 I also want to thank our partners in state
7 government at the different agencies who helped
8 prepare for today. First of all, Major Mike Turner
9 of the state police and the troopers that are here
10 today, thank you.

11 And also, the State Board of Accounts. First,
12 Bruce Hartman, the head of the State Board of
13 Accounts. Thank you, Bruce, for being here, as well
14 as Mike Rogina, Mike Williams, Kerry, Paul Lottes,
15 and your whole team here. I know that you put a
16 whole lot of work into this, and we now thank you
17 very much as well.

18 Any statements from the other two before we
19 move forward?

20 COMMISSIONER FERNANDEZ: No.

21 COMMISSIONER DURNIL: No.

22 CHAIRMAN ROKITA: Thank you.

23 We are reconvened. We are called to order.

24 We have in our packets documentation of a meeting
25 notice. And now we'll go to consideration of

1 matters pending before the Recount Commission.

2 First would be the petitions for recount in
3 House District 26, the Polles vs. Truitt race.

4 Is the petitioner here?

5 MR. REUBEN: Yes, sir.

6 CHAIRMAN ROKITA: Is the cross-petitioner here?

7 MR. BOCK: Yes, Your Honor.

8 CHAIRMAN ROKITA: The Commissioners and all
9 parties have been given guidelines for the conduct
10 of an election recount contest, as they've been
11 amended, December 3rd, 2008. I'm going to, in terms
12 of going through precinct by precinct, try to follow
13 these guidelines as best as humanly possible. They
14 start on page 3, basically, at section 20.

15 Have the parties agreed on an order for the
16 precincts in terms of the counties, in terms of
17 which county they want to start with first?

18 MR. BOCK: We would request, Mr. Chairman, that
19 the first county be Warren County, given that they
20 only have three precincts. And that might then
21 permit the clerk and her husband to leave earlier
22 than everyone else, who obviously will have to stay
23 for the precincts in Tippecanoe County.

24 CHAIRMAN ROKITA: Thank you. Does Mr. Polles
25 agree with that?

1 **MR. REUBEN:** That's fine, Your Honor -- or
2 Judge -- or, sorry -- Mr. Chairman.

3 However, I would like to address a matter
4 before such time as we take up either the recount or
5 the contest petitions, if I might, please.

6 **CHAIRMAN ROKITA:** Okay. How much time do you
7 need for this?

8 **MR. REUBEN:** Five minutes.

9 **CHAIRMAN ROKITA:** Any objection from the
10 petitioners?

11 **MR. BOCK:** No.

12 **CHAIRMAN ROKITA:** Go ahead, sir.

13 **MR. REUBEN:** Mr. Chairman, this is a matter
14 that I bring with a great deal of consideration
15 before having done what I'm about to do because of
16 the nature of the seriousness of my remarks which
17 will follow.

18 I must move at this time for your recusal or
19 your disqualification to sit on the Commission at
20 this time.

21 The basis for my motion for you to be recused
22 or be disqualified is that we're challenging the
23 designation of Tippecanoe County as a Voter Center
24 pilot county for this process. Our challenge is
25 based upon your approval of the application dated

1 July 31, '06. Your approval is based upon
2 IC 3-11-18-2.

3 The application which you approved,
4 Mr. Chairman, the application itself that you
5 approved and the system which was implemented in
6 this election based upon that application do not
7 meet the statutory requirements for a Vote Center
8 county election, as required by statute. I'm
9 referring specifically now to 3-11-18-1, et seq.

10 I would first draw your attention to 3-11-18-4,
11 if you have the statute, subsection 10.

12 I beg your pardon. 3-11-18-4(10) provides that
13 the -- referring now to the application -- for a
14 Vote Center county, it requires that a detailed
15 description of any hardware, software -- I'm
16 sorry -- hardware, firmware, or software used, and
17 it goes on to identify what it should be.

18 In the application which was presented by
19 Tippecanoe County, again, on July 31 of '06, or
20 dated July 31 of '06, I refer you to section 8,
21 pages 1 through 3. In there, it refers to the
22 software for electronic poll list, and I quote now
23 this application. "Larimer County, Colorado, has
24 been kind enough to offer their software to us free
25 of charge. Since we have not yet seen this

1 hardware, it is difficult to judge if it is suitable
2 for our environment. Should it not be suitable,
3 MITS believes that it would be very easy to write an
4 electronic poll book database in SQL that would
5 contain the following data elements." And then it
6 proceeds to identify what they would put in there.

7 The statute requires that it be a detailed
8 description, again, of any hardware, firmware, or
9 software used. The -- the part of their application
10 doesn't even give detail, let alone a detailed
11 description. They haven't seen it. They didn't
12 know whether it would operate here or not. And it
13 goes on to say even it doesn't operate here, what
14 they would do.

15 Well, with all due respect, their application
16 and the statute are about as polar as two sides of a
17 coin can be.

18 You approved of that application. You approved
19 of Larimer County having been kind enough to offer.

20 We don't know whether or not the offer was
21 accepted. We don't know whether the offer was
22 rejected. We don't know anything.

23 We certainly don't have a detailed description
24 of the hardware, firmware, or software used.

25 So that's our first point of contention, is

1 that that part of the statute was not going to be
2 covered.

3 Next we refer you to 3-11-18-7, which provides
4 that the -- again, I'm referring to 3-11-18-7,
5 subpart capital B. That particular provision
6 requires that, "Precinct election officials,
7 watchers, challengers, and poll book holders," it
8 requires that they be able to exercise their rights
9 and perform their duties within the Voter Center.

10 I direct your attention to the definition of
11 precinct election officials, which is contained back
12 on 3-6-6-1, to include one inspector and two judges.

13 What inspectors, what a judge is supposed to do
14 is to be able to challenge or not challenge a voter
15 based upon signatures in the poll book.

16 Well, there were no signatures in the poll
17 book. So by statute here, the variability of the
18 judges, or, in this case, within the body of
19 precinct election board, they can't do what they're
20 being -- what the statute requires them to do.

21 The statute here again requires that they be
22 able to carry out their function. They can't carry
23 out their function because among their function, the
24 judge, that is, is to be able to challenge the poll
25 worker -- I mean the voter, based upon the voter's

1 signature in the poll book.

2 There are no signatures in the poll book.
3 Therefore, the judges cannot do what the law
4 requires that they do, and that is exactly what
5 3-11-18-7 requires of them.

6 Now, moreover, again, Mr. Chairman, that's
7 within the application. And it's something that you
8 approved. And I think that to the extent that the
9 issue about the conduct of the election, based upon
10 the application that you approved, is very much at
11 issue here. And I think, because you've already
12 approved, and we're challenging your own approval, I
13 think you've got to stand down.

14 Now, moreover, if you turn to 3-11-18-13 --

15 **CHAIRMAN ROKITA:** Let's find that quickly,
16 because your five minutes is up. Make your point
17 quickly so I can allow the other side to respond.

18 You asked for five minutes. Five minutes is
19 up. Please move forward.

20 **MR. REUBEN:** I beg your pardon. 3-11-18-13
21 requires that -- and this may be as important as
22 anything we're dealing with. That statute requires
23 that the electronic poll book used at each Vote
24 Center must be capable of capturing an electronic
25 image of the signature of a voter on the list, and

1 may be formatted by -- by you -- I'm sorry. Must be
2 approved by you.

3 There was not -- that capacity was not within
4 the ability of these particular Vote Centers. And
5 I refer you to, again, their application, section 9,
6 page 2.

7 Section 9, page 2. And, if I may quote, in
8 paragraph no. 8, "In a perfect world, we would
9 purchase signature pads to connect the Diebold
10 electronic poll book that automatically programs the
11 correct voter access card.

12 "However, it is not likely that our county
13 council will fund the purchase of this equipment for
14 a two-year pilot program." And they didn't fund it.

15 So what we have is a poll book, an electronic
16 poll book without any signatures, and a system at
17 the Vote Centers that did not have the electronic
18 pad that would allow the transfer of that signature
19 to that electronic poll book.

20 The system -- again, with all due respect,
21 Mr. Commissioner, you approved a system, knowing
22 from their application they had -- they could not,
23 under the law, and they didn't intend to, and they
24 didn't.

25 If you look down next, please, to 3-11-18-16,

1 there it refers to how the Voter Center must
2 maintain a precinct identification of the vote tally
3 with -- separate from other precincts. It didn't do
4 that. It had one lump identification process within
5 the Vote Center. It wasn't separate, as the statute
6 requires.

7 Now, without signatures and electronic poll
8 book, as we all know were not in there as required,
9 the voter identification cannot be verified. If a
10 voter walks in, even with their driver's license or
11 their passport or their other state-issued
12 identification, that does not allow the poll
13 official to recognize that voter.

14 The identification statute allows the poll
15 worker only to look at the picture and name. It's
16 not allowed for comparison of signatures..

17 Therefore, the -- there's no way to identify
18 the voter with any kind of identification such as
19 their signature in the poll book, which is required
20 by statute, not only in this type of election, but
21 in, should I say, the hard book poll book. Which,
22 again, we're not worried about that here because
23 it's not applicable.

24 What is applicable is the electronic e-poll
25 book. It is void of any signatures. Therefore, it

1 cannot be compared -- or signatures cannot be
2 compared to anything because it's blank.

3 CHAIRMAN ROKITA: Okay. What else do you have?
4 Anything?

5 MR. REUBEN: Yes, sir, I do.

6 The Indiana constitution, article 3, section 1,
7 requires that -- and I'm quoting -- "all elections
8 shall be free and equal."

9 Now, there's no question about this election
10 being free. But it is not equal.

11 In every other county, as in Marion, where --
12 at least where I vote, you must present your ID, but
13 you also must present -- there must be a signature
14 to compare it against. There are two steps there.

15 Here, there's one step. And that's it. The
16 constitutional provision contains the word "equal."
17 It means uniform. It means the same. And it's not,
18 because of the way the system was maintained here.

19 And with all due respect, Mr. Rokita, you,
20 having approved of that application, having -- must
21 having recognized that not only did they not intend
22 to comply with the statute, they've told you in
23 there they weren't going to. And, to their credit,
24 they didn't.

25 The system is flawed. It's flawed from not

1 only the election day itself, but it's flawed from
2 2006, when they applied to you.

3 You approved it. You're just as much in error
4 as they are. You could have stopped it.

5 You didn't stop it then. You didn't stop it
6 now. I think because of that, the whole thing
7 that's at issue, with all due respect, sir, I think
8 you must step down because of the nature of your
9 involvement in the process.

10 **CHAIRMAN ROKITA:** Is there a response from the
11 other side?

12 **MR. BOCK:** There is. Thank you. I'd like to
13 have the amount of time that's been allotted to
14 Mr. Polles's counsel.

15 Apparently -- I had planned on giving an
16 opening statement that referenced the pilgrims and
17 the Mayflower Compact, and the cherished heritage of
18 voting in our country and protecting the right to
19 vote. And I guess we're pretty quickly right into
20 partisan politics.

21 This is a completely improper motion. And
22 Mr. Reuben knows, as well as each of the members of
23 the Commission do, the role of this Commission is
24 not a judicial body. It has no authority to set
25 aside a statute. It has no authority to rule on the

1 constitutional of the Vote Center Statute.

2 And the approval of Vote Centers is not a
3 ground for an election contest under the Recount
4 Commission Statute.

5 And because this motion and its substance is
6 so far outside the possible basis upon which this
7 Commission is authorized by statute to act is why I
8 say that this is nothing more than a partisan
9 political ploy, because the Recount Commission
10 simply doesn't have the authority to even address
11 the issues that are being raised by Mr. Reuben.

12 And I'd be happy to cite a number of cases
13 which reflect that an administrative body is not the
14 proper body to consider the constitutionality of the
15 statute. And rather than take up a lot of time,
16 right now I'll just cite a couple of them.

17 One is Style vs. Angola Die Casting Company,
18 783 N.E.2d 316, at page 321. "An administrative
19 body cannot determine the constitutionality of a
20 statute."

21 There are numerous Indiana Supreme Court cases
22 which state that the Recount Commission is not a
23 judicial body, one of which is the 1938 decision of
24 the Indiana Supreme Court in Lord vs. Sullivan,
25 where the Supreme Court said, "The Recount Statute

1 involves the exercise of ministerial functions and
2 not judicial ones."

3 Another case -- Indiana Supreme Court case to
4 the same effect is Williams vs. Bell, 1110 N.E. 753,
5 at page 755, in 1915.

6 Each of you know that your authority is
7 confined, no. 1, to recounting the votes, and no. 2,
8 to the five enumerated grounds for an election
9 contest and the Contest Statute. You can't go
10 beyond that. And none of the issues that are raised
11 by Mr. Reuben fall within the grounds for an
12 election contest.

13 And, in fact, Mr. Reuben knows that the only
14 ground that he's raised for an election contest is
15 a voting system malfunction. He has not identified
16 a single voting system malfunction in the district.
17 The machines tabulated accurately. They allowed the
18 accurate recordation of votes.

19 And because he's unable to find any evidence
20 within the statute to submit to this Commission,
21 he's, instead, resorted to an attack on the
22 Chairman.

23 I find it unfortunate. I find it completely
24 improper, and the Chairman should not recuse
25 himself.

1 **CHAIRMAN ROKITA:** Okay. Thank you both. Any
2 comments --

3 **MR. REUBEN:** Mr. Chairman --

4 **CHAIRMAN ROKITA:** No, no more. Any comments
5 from the Commissioners?

6 **MR. REUBEN:** May I now respond?

7 **CHAIRMAN ROKITA:** No. Are there any comments
8 from the Commissioners? Any motions from the
9 Commissioners?

10 **COMMISSIONER FERNANDEZ:** I'll make a quick
11 comment.

12 **CHAIRMAN ROKITA:** Go ahead.

13 **COMMISSIONER FERNANDEZ:** Thank you, Mr.
14 Chairman.

15 You know, it's interesting. As I thought
16 about the proceedings and some of the issues that
17 have been raised, there's certainly an interesting
18 connection as far as reviewing the plans that were,
19 by law, required to be approved by the Secretary of
20 State, and the unique role of serving as
21 administrator of elections, but also Chair of this
22 Commission.

23 You know, I think it's an interesting issue.
24 But I've got to say, based on my limited reading of
25 the statute, that it creates and sets outs the

1 powers and roles of the Commission. The best that
2 I can understand this argument, it's really a
3 voluntary request to the Chairman, because I don't
4 see any authority in the statute for the Commission
5 to make that kind of decision.

6 So, you know, I guess that's just the way I see
7 it. I don't think we really have a vote on this.
8 It's just really up to the Chairman of whether or
9 not he would agree with the argument as put forth by
10 Mr. Reuben.

11 **COMMISSIONER DURNIL:** I agree with that.

12 **CHAIRMAN ROKITA:** To the extent -- thank you,
13 Commissioner Fernandez and Commissioner Durnil.

14 To the extent that it was a voluntary request,
15 it's denied for a couple of reasons. It's denied by
16 statute. And I would direct Mr. Polles's counsel to
17 3-12-10-2.1. For the benefit of Mr. Polles, I'll
18 now read the statute.

19 "Except as provided in this section, the
20 Secretary of State and the designee of the State
21 Chairman of each of the major political parties of
22 the state shall serve as members of the State
23 Recount Commission." And then it goes on to provide
24 one or two exceptions.

25 And I may not serve for this position, as

1 Secretary of State may not serve, when he's a
2 candidate or when he's otherwise on the ballot.

3 So I don't think there's -- to agree with
4 Commissioner Fernandez, I don't think there is any
5 statutory mechanism for me not to serve.

6 In fact, the General Assembly made it a "shall"
7 provision; that the Secretary of State "shall be the
8 Chair" of this Commission.

9 Secondly, and it is irrelevant, but I will say
10 that you've not demonstrated any evidence of bias in
11 any of your argument, that I can't judge a recount,
12 a tallying of the votes. So we'll move on.

13 Do you agree with starting with Warren?

14 **MR. REUBEN:** Yes.

15 **CHAIRMAN ROKITA:** All right. We shall start
16 there. I'll have the Recount Director -- let's
17 see -- read the tally of votes in the State Board of
18 Accounts. We'll go in alphanumeric order. Is that
19 the order that we've put these precincts in,
20 starting with Warren?

21 **COMMISSIONER SKOLNIK:** That is correct,
22 Mr. Chairman.

23 **CHAIRMAN ROKITA:** We'll start with any
24 undisputed valid, invalid, or no votes.

25 **COMMISSIONER SKOLNIK:** Mr. Chairman, this

1 entire Warren County, Adams Precinct, in Adams
2 Precinct, the entire precinct, it's my
3 understanding, has been disputed by the petitioner.

4 So therefore there are no undisputed valid,
5 invalid, or no votes.

6 **CHAIRMAN ROKITA:** So we'll move to the disputed
7 ballots. Well, no, we'll take a motion. There are
8 none, so there's no motion needed.

9 **COMMISSIONER SKOLNIK:** I think we would -- and
10 Counsel, correct me if I'm wrong -- do we also then
11 go to the next precinct to ascertain whether there
12 are any undisputed ...

13 **COMMISSIONER KING:** Yes.

14 **COMMISSIONER SKOLNIK:** And we do all the
15 undisputed first in each precinct --

16 **CHAIRMAN ROKITA:** We don't go precinct by
17 precinct?

18 **COMMISSIONER KING:** Mr. Chairman, if I may
19 respond?

20 **CHAIRMAN ROKITA:** Yes.

21 **COMMISSIONER KING:** The guidelines anticipate
22 that the first part of the recount process is to
23 identify areas where there is agreement and not
24 dispute between the parties, which would include the
25 undisputed votes, either valid or invalid, and no

1 votes. It does not specify that that be done by
2 precinct. It's been done -- at least according to
3 past Commission practice, it's been done at the
4 beginning to narrow the issues for all precincts.

5 **CHAIRMAN ROKITA:** Okay. So can you give a
6 report, then, on all the precincts?

7 **COMMISSIONER SKOLNIK:** Mr. Chairman -- in
8 Warren County, or for the entire district?

9 **CHAIRMAN ROKITA:** For the entire district.

10 **COMMISSIONER SKOLNIK:** Let me just very briefly
11 state at the outset that the entire -- all precincts
12 throughout the entire district have been disputed by
13 the petitioner. Therefore, there are no undisputed
14 valid, invalid, or no votes, or undisputed -- no
15 votes within -- undisputed no votes within this
16 entire district. That covers both Warren County,
17 where we have three precincts, as well as the 35
18 precincts within Tippecanoe County.

19 **CHAIRMAN ROKITA:** Okay. So, now, on to the
20 disputed ballots, starting with the first precinct
21 in Warren.

22 **COMMISSIONER SKOLNIK:** Mr. Chairman and members
23 of the Commission, the total valid ballots tallied
24 by the State Board of Accounts reflects, for Adams
25 Precinct -- we'll start with Adams Precinct. I

1 apologize. Always takes us a minute to get into the
2 flow here.

3 But for Adams Precinct, the total valid ballots
4 tallied by the State Board of Accounts: Mr. Truitt,
5 158; Mr. Polles, 120.

6 The disputed valid ballots tallied by the State
7 Board of Accounts will read the same: Mr. Truitt,
8 158; Mr. Polles, 120.

9 There were 16 no votes tallied by the State
10 Board of Accounts, and those are disputed.

11 **MR. REUBEN:** And I'm prepared to withdraw part
12 of my dispute, which may make this proceeding move
13 more quickly.

14 **CHAIRMAN ROKITA:** Precinct by precinct? Do you
15 want to preserve that right?

16 **MR. REUBEN:** I mean those three precincts in
17 Warren, I will withdraw my dispute on all ballots,
18 but for the absentees, for purposes of what we're
19 doing here today.

20 I will not withdraw my dispute for what may be
21 a judicial review. But for purposes of going
22 forward today, I think I can shortcut a lot of what
23 we're doing by just bringing before you the absentee
24 ballots.

25 **MR. RUNYAN:** For point of clarification, there

1 were absentee ballots cast in the clerk's office
2 that were electronic, and then there are paper --

3 **MR. REUBEN:** I'm sorry. Let me -- let me
4 restate my -- let me -- adding further, the
5 challenge which I continue to maintain is over the
6 paper absentee ballots. And I will withdraw my
7 dispute, Mr. Chairman, to all other ballots which
8 were cast there for purposes of our hearing today.

9 Does that clarify?

10 **MR. RUNYAN:** Yes.

11 **CHAIRMAN ROKITA:** Does the cross-petitioner
12 have any objection to that?

13 **MR. RUNYAN:** To limiting it to the absentee
14 paper ballots?

15 **CHAIRMAN ROKITA:** Yes.

16 **MR. RUNYAN:** No.

17 **CHAIRMAN ROKITA:** Mr. Skolnik, does that change
18 the tally, or should we -- go ahead.

19 **COMMISSIONER KING:** Mr. Chairman and members of
20 the Commission, as I understand the guidelines,
21 we've now entered the portion of the proceedings
22 that involve the presentation of the petitioner's
23 case in chief, which calls for, in this case, the
24 production of exhibits related to the specific
25 ballots that remain in dispute in this precinct.

1 **MR. REUBEN:** Yes, sir.

2 **CHAIRMAN ROKITA:** So if he doesn't present
3 evidence, then we can just take it as a ruling
4 afterwards on a certain ballot?

5 **COMMISSIONER KING:** Yes. The guidelines
6 contemplate a ballot by ballot consideration, unless
7 there's an agreement to group ballots.

8 **CHAIRMAN ROKITA:** That is true. It's either
9 group ballots if they're the same argument, or
10 ballot by ballot.

11 **MR. REUBEN:** It's the same. It's an argument
12 as a matter of law, not as a matter of fact.

13 **CHAIRMAN ROKITA:** Why don't we start like this.
14 Why don't you start with your disputed ballots in
15 this precinct.

16 **MR. REUBEN:** That would be fine.

17 **CHAIRMAN ROKITA:** And then if you want to waive
18 at the end --

19 **MR. REUBEN:** That's fine.

20 **CHAIRMAN ROKITA:** -- then we can just tally at
21 the end.

22 **MR. REUBEN:** Yes, sir. That would be fine.

23 I don't know how the State Board of Accounts
24 has kept separate these disputed ballots from those
25 three precincts. Mike, I guess I'd ask you to come

1 forward with the ...

2 CHAIRMAN ROKITA: Do you have an exhibit
3 number?

4 MR. REUBEN: Yes, sir. I'm looking right now
5 at Warrant County, Adams, Exhibit 1. Do you -- have
6 you got them?

7 *(Discussion off the record.)*

8 CHAIRMAN ROKITA: Mr. Polles, go ahead.

9

10 PETITIONER'S CASE IN CHIEF

11 MR. REUBEN: I believe there are Exhibits 1
12 through 10 in Warren County, Adams township, ward,
13 or district, as the stamp is in the SBA.

14 And the issue which I wish to raise is that the
15 clerk's stamp -- I'm sorry -- the clerk's -- I'm
16 sorry. The clerk's official seal and signature or
17 facsimile signature does not appear on the back of
18 the ballot, as was required by 3-11-4-19, which
19 reads, in pertinent part, subject to another statute
20 which is inapplicable, "A ballot that is mailed must
21 bear the circuit court clerk's official seal and
22 signature or facsimile signature on the back of the
23 ballot."

24 CHAIRMAN ROKITA: Okay.

25 MR. REUBEN: These are -- 1 through 10, I

1 believe, Mr. Commissioner -- Mr. Chairman, all
2 failed to have that requirement met.

3 **CHAIRMAN ROKITA:** Okay. And then for the
4 benefit of the audience and those of us that are
5 here before the Commission for the first time --

6 **MR. REUBEN:** Yes, sir.

7 **CHAIRMAN ROKITA:** -- the petitioner is making
8 his case in chief now. Try to generally limit your
9 arguments in each of the precincts to five minutes.
10 But that's just a guideline. It certainly won't
11 count against you and time won't count against it if
12 the Commissioners have questions.

13 And then a response from the cross-petitioner
14 during the petitioner's case in chief is also
15 appropriate. And you have a cross-petition, so
16 we'll -- in this recount after we get through the
17 petitioner's case in chief, you'll have a chance for
18 your case in chief, with a response from the
19 petitioner at that point, if necessary.

20 So you -- the point being, again, that was for
21 the audience mostly.

22 You have a chance to respond to that first
23 argument. Is there a response?

24 **MR. RUNYAN:** Oh, yes, sir. I'm sorry.

25 3-12-1-12 (b), "Except as provided in section 13 of

1 this chapter, a ballot that has been marked and cast
2 by a voter in compliance with this title but may
3 otherwise not be counted solely as a result of the
4 act or failure to act of an election officer may
5 nevertheless be counted."

6 Mr. Chairman, we don't disagree that there's
7 not a clerk stamp. The failure to have the clerk
8 stamp was an error by the election official
9 providing that stamp.

10 We're prepared to call Jackie Brier at this
11 time to testify as to the nature of these ballots.

12 It's ultimately our belief that the section I
13 just read controls here. The error by the clerk to
14 not have the stamp does not invalidate the ballots.

15 **CHAIRMAN ROKITA:** Would the Commissioners like
16 to hear from Clerk Brier? Do they feel it's
17 necessary to hear from Clerk Brier?

18 Why don't you call your witness.

19 **MR. RUNYAN:** Ms. Brier?

20 **CHAIRMAN ROKITA:** Clerk Brier, why don't you
21 have a seat there.

22

23 *(The witness takes the stand.)*

24

25 **CHAIRMAN ROKITA:** Clerk Brier, before you sit

1 down, will you raise your right hand and repeat
2 after me.
3

4 JACQUELINE BRIER, a witness called in this
5 proceeding, having been first duly sworn by
6 Chairman Rokita, takes the stand and testifies as
7 follows:
8

9 CHAIRMAN ROKITA: Thank you. Have a seat.
10 The respondent can proceed.
11

12 DIRECT EXAMINATION,

13 QUESTIONS BY STEVEN E. RUNYAN:

14 Q Ma'am, would you state your full name and spell it
15 for the record, please.

16 A Jacqueline Brier, J-A-C-Q-U-E-L-I-N-E, B-R-I-E-R.

17 Q And what's your occupation?

18 A Clerk of Warren Circuit Court.

19 Q When were you first elected?

20 A Six years ago.

21 Q And then have been re-elected since that time?

22 A Yes.

23 Q During the course of your tenure as the clerk, how
24 many elections have you overseen?

25 A Five, six. Five.

1 Q Okay. And are you familiar with the ballots, the
2 absentee ballots that were cast in the 2008 general
3 election?

4 A Yes.

5 Q Are the ballots that were cast in this election
6 similar to the ballots that have been used
7 throughout your tenure?

8 A No. My first term we used punch cards.

9 Q The punch cards, were they preprinted with the
10 clerk's seal?

11 A Yes, they were.

12 MR. REUBEN: With all due respect, those
13 ballots were of a different system in a different
14 election. They're clearly irrelevant, sir, and I
15 think it's inappropriate to submit any testimony
16 about them.

17 CHAIRMAN ROKITA: I appreciate that,
18 Petitioner. And because of that, if you want to
19 cross for a short period of time, I'll let you do
20 that.

21 MR. RUNYAN: Your Honor, if I may approach?

22 BY MR. RUNYAN:

23 Q This is Exhibit 1. Do you recognize the ballot?

24 A Yes.

25 Q Does it have the clerk's seal on it?

1 **A** It does not.

2 **Q** When did you first receive a sample -- or let me
3 back up. Before the election, were you provided a
4 sample ballot by your vendor?

5 **A** Yes. The 15th of August we received the first --
6 first printing.

7 **Q** And then do you review the ballots for accuracy?

8 **A** Yes. Our election board and the two county chairmen
9 looked over the ballots.

10 **Q** Would you identify who those people were by name?

11 **A** Deborah Hyatt (phonetically) is the Republican
12 election board member. She's the president. Billy
13 Minton (phonetically) is the Democrat election board
14 member.

15 Bill Miller is our county Republican Chair, and
16 Chris Brown is our Democrat Chair. Sorry.

17 **Q** Thank you, ma'am. All of those individuals reviewed
18 those sample ballots?

19 **A** They did.

20 **Q** And they did not have the clerk's seal?

21 **A** Correct.

22 **Q** Did anyone raise the lack of the clerk's seal as a
23 concern?

24 **A** No.

25 **Q** Were you aware that the ballot needed a clerk's seal

1 on it?

2 A I remember when we had the punch cards, that when
3 you were running for office at one of our election
4 meetings, we had to make sure that we bought a stamp
5 that did not have our signature on it. It was just
6 a stamp.

7 And I did not have -- I ordered the stamp. I
8 didn't have to use it because the punch cards were
9 printed with the seal on it.

10 And I had just since overlooked that --

11 Q Was there any reason -- oh, I'm sorry.

12 A I'm sorry. What?

13 Q Was there any reason there was not a seal placed on
14 there, any conscious reason?

15 A No. It was just a mistake that was -- that was
16 overlooked by all of us.

17 Q Do you see the initials that are located at the
18 bottom right?

19 A Yes.

20 Q And are those initials placed on the ballot by your
21 absentees board?

22 A Yes, they are.

23 Q How many house districts are within Warren County?

24 A Two.

25 Q And are all the ballots consistent throughout both

1 districts, with the exceptions of the races that are
2 in --

3 A Correct.

4 Q -- none of them -- none of them have a clerk's seal?

5 A None of them do.

6 Q On the ballots where the initials were placed, it
7 says, "Clerk's initials," and there's two lines.

8 Do you see that?

9 A Yes.

10 Q Does your office stamp those, or do they come
11 preprinted?

12 A That comes printed that way.

13 Q And then your absentee board signs it -- or
14 initials it?

15 A Initials, yes.

16 Q Okay.

17 MR. RUNYAN: I don't have anything else.

18 CHAIRMAN ROKITA: Petitioner, did you want a
19 chance to ask a few questions of this witness?

20 MR. REUBEN: Just a couple.

21 CROSS-EXAMINATION,

22 QUESTIONS BY MR. LAWRENCE M. REUBEN:

23 Q The information you provided about the punch card
24 election which you held previous to this one?

25 A Yes.

1 Q It's a different system, isn't it?

2 A Yes, it is.

3 Q And different rules applied, isn't that correct, in
4 terms of how you did things?

5 A Yes.

6 Q And what we're talking about here, ma'am, as you
7 understand, are absentee ballots that were mailed
8 out to your constituent voters?

9 A Yes.

10 Q And they came back. And those were ballots without
11 your seal, signature, or facsimile. You understand
12 that?

13 A Yes.

14 Q All right.

15 MR. REUBEN: That's all I have.

16 CHAIRMAN ROKITA: Thank you. Do you have any
17 rebuttal to anything that he brought up?

18 MR. RUNYAN: Yes, Your Honor.

19 REDIRECT EXAMINATION,

20 QUESTIONS BY MR. STEVEN E. RUNYAN:

21 Q Ma'am, do you have any doubt that that's a valid
22 ballot --

23 MR. REUBEN: I've got to -- that's your
24 decision, not hers. That's a question of law as to
25 whether it's valid ballots. We're here to argue

1 about -- you make a decision about that, not the
2 clerk.

3 CHAIRMAN ROKITA: I agree.

4 MR. RUNYAN: I have a question whether she has
5 any doubt, Mr. Chairman.

6 CHAIRMAN ROKITA: I agree. Her opinion is
7 irrelevant to me at this point.

8 Any other questions?

9 MR. REUBEN: No, sir.

10 CHAIRMAN ROKITA: Thank you very much.

11 WITNESS BRIER: You're welcome.

12

13 *(The witness leaves the stand.)*

14

15 MR. REUBEN: Judge, the statute he referred to,
16 that he hung his hat on, 3-12-1-12, specifically
17 says, "Except as provided in section 13 of this
18 chapter." Reading down, 13 says, "This section
19 applies only to absentee ballots."

20 The one he was referring to does not. That --
21 that particular subpart refers to -- it clearly
22 says, "This section applies only to absentee
23 ballots." The whole ballot may not be counted
24 unless the ballot is endorsed with initials, and so
25 forth.

1 He omitted referring to what was the exception
2 in 3-12-1-12.

3 **CHAIRMAN ROKITA:** Okay. Because this is the
4 first time we've had this argument, there may be
5 more time to have the same argument --

6 **MR. REUBEN:** Yes, sir.

7 **CHAIRMAN ROKITA:** -- recount proceeding, and
8 taking a little bit more time to lay out the facts
9 and the evidence, and --

10 **MR. REUBEN:** Yes, sir.

11 **CHAIRMAN ROKITA:** -- because of that, I'm
12 going to ask, before I open the floor to the
13 Commissioners, I would like each of our counsel to
14 give us a brief description of the law for our
15 deliberations.

16 We'll start with majority counsel here, Brad
17 King. Thank you, Brad.

18 **COMMISSIONER KING:** Thank you, Mr. Chairman,
19 and members of the Commission.

20 3-12-1-12 and 3-12-1-13 are interrelated. And
21 that relationship was clarified by the Court of
22 Appeals, most recently in the Sullivan vs. Krughoff
23 case, 889 N.E.2d 1289. 3-12-1-12(a) states, "This
24 section applies to votes cast by any method."

25 Then subsection (b) of section 12, says,

1 "Except as provided in section 13 of this chapter."

2 Then the argument has been set forth that, "A
3 ballot marked and cast by a voter in compliance with
4 the election code may otherwise -- but may otherwise
5 not be counted solely as a result of the act or
6 failure to act of an election officer may,
7 nevertheless, be counted in a recount proceeding,
8 unless evidence of fraud, tampering, or misconduct
9 affecting the integrity of the ballot is presented
10 by a party to the proceeding."

11 And then, "(c) The act or failure to act by an
12 election officer is not by itself evidence of fraud,
13 tampering, or misconduct affecting the integrity of
14 the ballot."

15 Section 13 provides a narrow, specific
16 exception to the general rule in section 12 which
17 states that with regard to absentee ballots, the
18 whole ballot may not be counted unless the ballot is
19 endorsed with the bipartisan set of initials
20 described there.

21 Section 13's narrow exception does not extend
22 to other errors made by an election official
23 involving absentee ballots, such as the failure to
24 print the clerk seal or clerk signature.

25 And therefore, section 12 would apply.

1 **CHAIRMAN ROKITA:** Thank you. Democratic
2 counsel, anything to add or subtract?

3 **COMMISSIONER BARNES:** Thank you, Mr. Chairman.

4 There is another code section that the
5 Commission may want to take a look at to get a full
6 picture. I agree with Mr. King that section 13 is
7 an exception to section 12 and applies to absentee
8 ballots in the Sullivan case. The Court held that
9 one absolute rule was that absentee ballots must
10 bear the initials of the absentee voter board in
11 order to be counted, but the case did not address
12 the clerk seal.

13 I guess I would point the Commission -- in
14 section 12, it talks about the mistake or failure to
15 act of an election official. And if you look
16 earlier in 3-12-1, there's a definition of election
17 official. It's a person employed or appointed by a
18 political subdivision to carry out the duties of
19 Title III. And the clerk by that definition is not
20 an election official.

21 However, there is -- there's a code section
22 earlier in Title III which requires that it's the
23 county election board that prints the ballots.

24 And so I guess the question for the Commission
25 is, who is responsible for putting the seal there?

1 Is it the county election board? If so, they're an
2 election official, and section 12 may apply.

3 If it's the -- it seems to me if it's the
4 clerk's duty to put the seal there, then 3-12-1-12
5 might not apply, because she, the clerk, is not --
6 she's an elected official, not an appointed
7 official, and therefore not an election officer
8 under this chapter.

9 **COMMISSIONER DURNIL:** What about being the
10 secretary of the election board? Doesn't that make
11 her an election official?

12 **COMMISSIONER FERNANDEZ:** Is she the secretary
13 by nature of her elected office --

14 **COMMISSIONER DURNIL:** Right.

15 **COMMISSIONER FERNANDEZ:** -- or by appointment?

16 **COMMISSIONER BARNES:** She serves in two
17 capacities: As the clerk and as a member of the
18 county election board.

19 I guess the question is, the way I see it is,
20 whose duty is it to put the seal there? The county
21 election board or the clerk?

22 **MR. BOCK:** Are we allowed to respond to that?

23 **CHAIRMAN ROKITA:** Well, no, not at this time,
24 thank you, unless the Commissioners have a specific
25 question, if you want to get to the Commissioners'

1 questioning part.

2 One more round -- I don't want to keep going
3 back and forth like this -- but go ahead, Brad.

4 **COMMISSIONER KING:** I have one brief response,
5 Mr. Chairman, to the points raised by Ms. Barnes.
6 Under 3-6-5-14, each county election board shall
7 prepare all ballots.

8 **CHAIRMAN ROKITA:** Okay. Leslie, anything to
9 add to that?

10 **COMMISSIONER BARNES:** And that was the code
11 section -- I couldn't put my finger on the statute.
12 But Mr. King's correct that the county election
13 board prepares the ballot. But whose -- just like
14 the initials are not placed there until the day of
15 the election, when is the seal put there? Is the
16 seal put there -- is it preprinted, or is this seal
17 put there at the time of the election to
18 authenticate the ballot?

19 And that's kind of the purpose of these
20 statutes, the initials and the seal, is to
21 authenticate.

22 **CHAIRMAN ROKITA:** Thank you both, Counsel.

23 First I'll ask for any questions from the
24 Commissioners to the parties, and then I want to
25 take motions from the Commissioners.

1 Hearing none, any motions from the
2 Commissioners?

3 **COMMISSIONER DURNIL:** I would move we -- that
4 clearly, the error or mistake of the election
5 official --

6 CHAIRMAN ROKITA: Is there --

7 COMMISSIONER DURNIL: -- recount the ballots.

8 CHAIRMAN ROKITA: Second for discussion.

9 Discussion amongst the Commissioners.

10 COMMISSIONER FERNANDEZ: Well, I guess part of
11 the discussion -- I'm just trying to get clarity in
12 terms of can someone answer the question about when
13 the seal is actually applied? Is it a preprinted
14 ballot, or is there -- is that how it typically
15 works?

16 CHAIRMAN ROKITA: Do you want to call the clerk
17 back up?

18 COMMISSIONER FERNANDEZ: Or if someone else
19 knows.

20 CHAIRMAN ROKITA: Why don't we just call the
21 clerk back up.

22 Clerk Brier, could you come back up. The
23 Commission has some questions for you.

24

25 (The witness re-takes the stand.)

1 **MR. BOCK:** While she's doing that, could I make
2 a response, Mr. Chairman? Because some of this is
3 new argument we haven't had an opportunity to
4 address. It's very limited. And I'll abide by
5 whatever decision you make, obviously.

6 **CHAIRMAN ROKITA:** If the Commissioners have a
7 question, I'll let them address it to you, but
8 that's it right now. Thank you.

9 Clerk Brier, you're still under oath. Thank
10 you very much for coming back while the
11 Commissioners ask you questions.

12 **WITNESS BRIER:** Okay.

13 **COMMISSIONER FERNANDEZ:** The ballots, are they
14 preprinted with the seals, typically, or is that
15 something that someone physically adds after the
16 ballots come back to the election board or the
17 clerk's office?

18 **WITNESS BRIER:** In my experience, in the past
19 they have been printed on there. And that's -- when
20 they had presented the ballots to me up here the
21 other day and asked for the clerk's seal, my first
22 response was, "It's printed on the back." And
23 Mr. Reuben said, "No, it isn't."

24 And that's when I realized that it wasn't on
25 there; that normally, the printer would print that

1 on there for you.

2 CHAIRMAN ROKITA: Do you happen to know if this
3 is a practice in just your county, or is this across
4 the state, or do you happen to --

5 WITNESS BRIER: I honestly don't know that. I
6 don't know.

7 MR. REUBEN: Can we question on his questions?

8 CHAIRMAN ROKITA: I'll tell you what. In the
9 interest of getting this squared away, since this is
10 the first argument of the day and there's going to
11 be more, in the interest of being efficient down the
12 road, go ahead.

13 MR. REUBEN: Ma'am, you don't know, from what
14 you've said, whether or not the -- because you
15 didn't do it in this election, as far as putting the
16 stamp on there at any time, did you?

17 WITNESS BRIER: I did not.

18 MR. REUBEN: So all the ballots we're talking
19 about here, these absentees, did not carry your
20 stamp and seal or your signature, right?

21 WITNESS BRIER: Correct.

22 MR. REUBEN: How do you know when -- or do you
23 know when, under ordinary circumstances, you would
24 place your seal and stamp on there if, in prior
25 elections, it was already on there before it goes

1 out?

2 WITNESS BRIER: It would have been printed on
3 the back of the ballot.

4 MR. REUBEN: Are you sure about that?

5 WITNESS BRIER: That's -- that's how we had
6 done it in the past.

7 MR. REUBEN: But you don't know if that's the
8 way it's done now, do you?

9 WITNESS BRIER: That's the way it's -- that's
10 the way we want to do it from this point on.

11 MR. REUBEN: Is it true the ballot -- the
12 stamp -- the clerk's seal and signature would go
13 out, would be put on there just before the ballot is
14 mailed out to the voter?

15 WITNESS BRIER: It should be on there before
16 the ballot is mailed to the voter.

17 MR. REUBEN: Right. It should be put on there
18 not by the printer, because you don't know whether
19 or not the -- you're ever going to use those.

20 Isn't it true that the stamp goes on there when
21 you mail the ballot out to the voter?

22 WITNESS BRIER: In the past it's been printed
23 on there, and it was initialed by the absentee board
24 just before the ballot went in the mail.

25 MR. REUBEN: All right. I'm not -- the past

1 is -- that's not what we're talking about here.
2 We're talking about this type of election with these
3 kinds of ballots.

4 Are you not -- are you sure that it goes --
5 that the stamp is put on there at sometime other
6 than just before it's mailed to the voter? Are you
7 sure?

8 **WITNESS BRIER:** I would, in the future, have
9 my seal printed on the ballot, and then the clerks
10 that were working the absentee board would initial
11 that ballot before -- because I feel like when
12 that ballot is approved and my seal is on it,
13 then that ballot has -- after it's been printed,
14 the whole -- the board, everyone has reviewed it,
15 and we feel that that ballot is correct, that my
16 seal on there could be printed on the ballot at that
17 time when we have determined that the ballot is
18 correct.

19 **MR. REUBEN:** What is the -- tell us what the
20 purpose, please, is of your clerk's seal and
21 signature or facsimile on the absentee ballot.

22 **MR. BOCK:** This goes beyond the scope of the
23 previous question.

24 **CHAIRMAN ROKITA:** I completely agree. I'd like
25 to have the cross-petitioner respond with any

1 questions that they may have for this witness.

2 MR. BOCK: I don't have any questions related
3 to this. We don't have any.

4 CHAIRMAN ROKITA: The Commissioners are ready
5 to take a vote on that.

6 So could you repeat the motion?

7 COMMISSIONER DURNIL: The motion is that the
8 failure to have a seal on there is the failure to
9 act of an election official. The initials are
10 there, so that we should count the ballots.

11 CHAIRMAN ROKITA: All in favor? Aye.

12 COMMISSIONER DURNIL: Aye.

13 CHAIRMAN ROKITA: All opposed?

14 COMMISSIONER FERNANDEZ: Aye.

15 CHAIRMAN ROKITA: Two to one. The motion
16 carries. Next argument in this precinct?

17 MR. REUBEN: We have none.

18

19 *(The witness leaves the stand.)*

20

21 CHAIRMAN ROKITA: Mr. Director, can you tally
22 the votes?

23 COMMISSIONER SKOLNIK: Mr. Chairman, the tally
24 of the votes in -- for Adams Precinct in Warren
25 County reflects 158 -- I'm sorry -- for Truitt, 158;

1 Polles, 120; 16 no votes.

2 **CHAIRMAN ROKITA:** Next precinct in Warren
3 County?

4 **COMMISSIONER SKOLNIK:** Mr. Chairman, the next
5 precinct in Warren County is Medina -- is that the
6 correct pronunciation of that?

7 The total ballots tallied by the State Board of
8 Accounts reflected 123 for Truitt, 77 for Polles.
9 There were nine no votes tallied by the State Board
10 of Accounts, and all ballots were disputed.

11 It's my understanding, if I'm not mistaken,
12 that the precinct -- the dispute for the entire
13 precinct has been withdrawn, but there are -- I
14 assume that there are individual exhibits for
15 absentee ballots --

16 **MR. ROGINA:** Yes, there are.

17 **CHAIRMAN ROKITA:** Thank you. Mr. Polles?

18 **MR. REUBEN:** May I move for a brief recess?
19 What just occurred may be dispositive, and I need
20 to make a couple of -- confer with my client. And
21 I may be prepared to withdraw our petition at this
22 point, but I would request a brief recess of the
23 Commission.

24 **CHAIRMAN ROKITA:** How much time do you think
25 you need?

1 **MR. REUBEN:** Fifteen minutes. I'd rather tell
2 you 15 and come back in 5. And Mr. Rokita, you and
3 I have been crossing paths long enough to know that
4 brevity is not one of my better qualities.

5 **CHAIRMAN ROKITA:** I know. And it's so early in
6 the day.

7 **MR. REUBEN:** And I'm trying to end the day,
8 sir.

9 **CHAIRMAN ROKITA:** Do the Commissioners object
10 to that or have an alternative plan?

11 **COMMISSIONER DURNIL:** How about 10 minutes?

12 **MR. REUBEN:** Oh, you want to negotiate?

13 **CHAIRMAN ROKITA:** The Commission will stand
14 in recess for 10 minutes, and promptly come back at
15 1:10.

16 *(A recess is taken, after which, the*
17 *proceedings resume as follows:)*

18 **CHAIRMAN ROKITA:** The State Recount Commission
19 will come back to order. The recess went 15 minutes
20 beyond what the original plan was.

21 Petitioner, do you have any comments?

22 **MR. REUBEN:** Yes, sir. And I apologize for the
23 delay, but I think in the spirit of why the recess
24 was called, it was -- the extra 15 minutes was
25 warranted. And I think we'll be -- you'll be

1 pleased for the rest of the afternoon.

2 I wish to withdraw at this time the recount and
3 contest petition on behalf of petitioner.

4 **CHAIRMAN ROKITA:** In total? Recount and
5 contest?

6 **MR. REUBEN:** Yes, sir.

7 **CHAIRMAN ROKITA:** Okay. Is there a response?

8 **MR. BOCK:** Well, of course, we have our
9 cross-petition. Which we'll withdraw.

10 **MR. REUBEN:** Or you can become a Democrat.

11 **CHAIRMAN ROKITA:** Then I'll go to our two
12 counsel. Is there any reason that the Recount
13 Commission can't entertain this proposal?

14 **COMMISSIONER KING:** Mr. Chairman, members of
15 the Commission, no, there is not.

16 The language in the 3-12-11-12(e) contemplates
17 dismissal motions, and notes that whenever the
18 petitioner and each cross-petitioner or respondent
19 file a joint motion to dismiss a recount or contest,
20 the Commission shall rule on the motion to dismiss
21 before ordering or continuing with the recount or
22 contest.

23 And I would just suggest clarifying for the
24 record that what's been -- the motion made by the
25 petitioner and cross-petitioner or respondent would

1 constitute a joint motion to dismiss the recount and
2 contest under this provision.

3 COMMISSIONER DURNIL: And I would move to
4 accept it.

5 CHAIRMAN ROKITA: Okay. There was a motion to
6 accept that, and I'll second it for discussion.

7 Before that, let me get comment from other
8 counsel first. Do you have anything to add or
9 subtract?

10 COMMISSIONER BARNES: No. This took me by
11 surprise.

12 CHAIRMAN ROKITA: Okay. Could we take this
13 other joint motion -- do both sides agree?

14 MR. REUBEN: Yes, sir.

15 MR. BOCK: Yes, sir.

16 CHAIRMAN ROKITA: Commissioner Durnil, any
17 discussion?

18 COMMISSIONER DURNIL: No.

19 CHAIRMAN ROKITA: The Chair has no discussion.
20 All in favor of Commissioner Durnil's motion signify
21 by saying aye.

22 *(The Commission unanimously responds "aye.")*

23 CHAIRMAN ROKITA: Aye. No opposed. The motion
24 passes unanimously.

25 And now we'll go for the tallies. I'll

1 recognize the Recount Director.

2 COMMISSIONER SKOLNIK: Are we required,
3 Counsel, to render a tally if there's been a joint
4 dismissal?

5 COMMISSIONER KING: Mr. Chairman, I would
6 recommend for the purposes of the record of this
7 proceeding that the tally be documented to reflect
8 the dismissal.

9 COMMISSIONER DURNIL: So that would be the
10 official record.

11 CHAIRMAN ROKITA: Could we adopt the tally by
12 the State Board of Accounts as the official tally
13 with one motion? Without reading all this into the
14 record, can we adopt this State Board of Accounts
15 tally into the record?

16 COMMISSIONER KING: Mr. Chairman, members of
17 the Commission, I think as long as the document
18 referenced is clearly set forth in that motion, that
19 that would constitute sufficient evidence for the
20 record.

21 CHAIRMAN ROKITA: Counsel?

22 COMMISSIONER BARNES: Thank you, Mr. Chairman.
23 I'm not sure, and I wonder if I might ask for a
24 minute to look through the guidelines.

25 If both petitioner and cross-petitioner move

1 to withdraw, I wonder if the election day results
2 should stand and not the recount, the State Board of
3 Account's results.

4 **CHAIRMAN ROKITA:** Okay. Let's go ahead and --
5 first of all, I want to thank both Mr. Polles and
6 Mr. Truitt for their joint motion.

7 And I don't want to spoil that good nature by
8 taking a short recess, but I want to get this right
9 under the law.

10 **MR. REUBEN:** How long do you need, sir?

11 **CHAIRMAN ROKITA:** Let us take not more than 10
12 minutes.

13 **MR. REUBEN:** May I borrow your director to come
14 knock on your door?

15 **COMMISSIONER SKOLNIK:** I only knocked once.

16 **CHAIRMAN ROKITA:** If it goes after 15, yeah.

17 We'll take hopefully less than 10 minutes to
18 get this straight so we know which records need to
19 be produced. Thank you.

20 *(A recess is taken, after which, the*
21 *proceedings resume as follows:)*

22 **CHAIRMAN ROKITA:** The State Recount Commission
23 will come back to order.

24 As we recessed I asked the Republican and
25 Democratic counsel to get together and see if they

1 could agree on how the Commission should proceed
2 with regard to the tally, the State Board of
3 Accounts tally of the votes.

4 And I understand that there is an agreement
5 amongst Counsel, and I'll ask the Democratic counsel
6 to state that joint opinion, please.

7 **COMMISSIONER BARNES:** Thank you, Mr. Chairman.
8 Brad, what was the statutory reference?

9 **COMMISSIONER KING:** 3-12-11-19 is the key one.

10 **CHAIRMAN ROKITA:** 3-12-11-19. Sorry to put you
11 on the spot there.

12 **COMMISSIONER BARNES:** Thank you, Mr. Chairman.
13 Counsel got together and talked. And when a
14 recount is completed, Indiana Code 3-12-11-18 [sic]
15 requires that the Recount Commission would make and
16 sign a certificate showing a tally of the votes.

17 But since this recount has been dismissed and
18 not completed, it is our understanding that the
19 results that the co-directors of the Indiana
20 Election Commission certified on November 24th
21 will stand. And that was our recommendation to the
22 Commission.

23 **CHAIRMAN ROKITA:** Okay. Thank you very much.
24 I'll take that as a joint?

25 **COMMISSIONER KING:** Yes, Mr. Chairman. That's

1 correct.

2 CHAIRMAN ROKITA: Okay. With that, we'll move
3 to -- I don't think there's a motion necessary.
4 We'll move to other business and additional matters
5 before consideration before this Commission.

6 Anything else?

7 COMMISSIONER SKOLNIK: Mr. Chairman, in the
8 past, I, as Recount Director, usually the next day
9 or so, have written orders dissolving the
10 impoundment so that the election materials that have
11 been impounded -- to lift that impoundment, orders
12 can be issued, which I know the clerks appreciate so
13 they can begin to do their work again. I'm
14 certainly prepared to do that here in the next day
15 or so.

16 There may be a number of other very minor
17 housekeeping matters that we probably may want to
18 address. In the past -- and I think standing order
19 2006-01 allows me to continue to do this -- the
20 Recount Director has been authorized by the
21 Commission to approve the payment of expenses that
22 are submitted by the state agencies that provide
23 assistance in this matter.

24 In addition, there are expenses that are
25 incurred by members of the Commission.

1 Counsel, you, I think, probably recall those.
2 I think there is a per diem as well as travel
3 expenses. And I'm prepared to work with the
4 Commissioners in making sure that those expense
5 vouchers, or whatever, are submitted on a timely
6 basis.

7 **CHAIRMAN ROKITA:** And I'm sure you'll work with
8 the agencies for their expenses.

9 **COMMISSIONER SKOLNIK:** Yes. We've done that in
10 the past.

11 The one difference, as I recall, is regarding
12 the payment of my bill. I believe, I think, in the
13 past it was -- was the Chairman authorized to
14 approve that? Is that how we proceeded on that?
15 Obviously, I can't be in a position of authorizing
16 my own statement for services rendered.

17 **CHAIRMAN ROKITA:** Yeah, we'll hold with that
18 and I'll copy the Commissioners.

19 **COMMISSIONER SKOLNIK:** Yeah, I can't
20 really copy -- obviously, on my statement as well
21 as other expenses, we have copied members of the
22 Commission.

23 **CHAIRMAN ROKITA:** Anything else? Anything from
24 the Commissioners? Any final statements
25 Commissioner Durnil, Commissioner Fernandez?

1 **COMMISSIONER FERNANDEZ:** I mean I don't want to
2 prolong this at all, but I think that there's a lot
3 of really good intentions in terms of the process of
4 using the Voter Centers. It's sort of a first take
5 on this pilot legislation that's going to be up for
6 review, statutorily, in the next session.

7 I think to the extent that we can -- not "we"
8 the Commission, but the people involved in the
9 election process at the state and local level can
10 sort through some of these issues. And I think we
11 would be well-served so that folks can know with
12 certainty how to proceed in utilizing the voting
13 center process, but do it in a way that, you know,
14 if there's potential conflicts between existing
15 election law and the center plan, that we get these
16 things resolved so that we don't come back in the
17 future and have other issues that will be longer
18 than this particular hearing.

19 **CHAIRMAN ROKITA:** Thank you, Commissioner
20 Fernandez and Commissioner Durnil, for your service
21 and continued service to the state.

22 I want to thank Recount Director Skolnik for
23 his work, and, of course, both counsel, and again,
24 the state agencies involved, as well as both county
25 clerks who are here today, and their respective

1 election boards.

2 This process worked today because the process
3 is transparent, because I believe we have very good
4 and solid recounting contest laws here in the state
5 of Indiana.

6 I want to thank the candidates for bringing
7 this matter forward for the transparency of the
8 voters and taxpayers.

9 And then, with regard to the Vote Center
10 concept, I did not engage the petitioner on any of
11 his substantive arguments because they related to
12 things that were not in question in terms of his
13 voluntary request. They had to do with bias of the
14 Chair. None of that was presented, so I didn't take
15 that as an opportunity to go into any of the
16 potential conflicts or praises that can happen with
17 the Vote Centers.

18 But I do think that because the Vote Center is
19 in a pilot stage, this is very much part of that
20 pilot. And to the extent that Vote Centers are
21 considered to be something that the General Assembly
22 wants to continue on and do in the 21st Century so
23 that we can vote how we live in the 21st Century, I
24 think this recount will provide some good
25 information to make sure that everyone feels secure

1 in that regard, especially the voters and taxpayers.

2 So thank you very much. I appreciate, again,
3 the Commissioners' service today.

4 And assuming no other additional matters for
5 consideration, I'll ask for a motion to adjourn.

6 **COMMISSIONER DURNIL:** So move.

7 **CHAIRMAN ROKITA:** Second. All in favor say
8 aye.

9 *(The Commission unanimously responds "aye.")*

10 **CHAIRMAN ROKITA:** Thank you very much.

11

12 *(WHEREUPON, the Recount Commission Hearing in*
13 *the above-captioned matter is adjourned on the 7th*
14 *day of December, 2008, at 1:50 p.m.)*

15

16

17

18

19

20

21

22

23

24

25

1 STATE OF INDIANA)
2) SS:
3 COUNTY OF HAMILTON)

4 I, Jenny L. Reeve, RPR, CSR No. 00-R-3006, a
5 Notary Public and Stenographic Reporter within and
6 for the County of Hamilton, State of Indiana at
7 large, do hereby certify that on the 7th day of
8 December, 2008, I took down in stenograph notes the
9 foregoing hearing of the Indiana State Recount
10 Commission.

11 That the transcript is a full, true, and
12 correct transcript made from my stenograph notes,
13 to the best of my ability.

14 IN WITNESS WHEREOF, I have hereunto set
15 my hand and affixed my notarial seal this 24th
16 day of December, 2008.

17

18

19

20

21 My Commission Expires:
22 June 16, 2016

23

24 County of Residence:
25 Hamilton County

26

27

Jenny L. Reeve
NOTARY PUBLIC